LEVINE, BLASZAK, BLOCK & BOOTHBY
1300 CONNECTICUT AVENUE, NW
SUITE 500
WASHINGTON, D C 20036-1703
(202) 223-4980
FAX (202) 223-0833

October 6, 1995

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

RE: In the Matter of AT&T Contract Tariff No. 360
CC Docket No. 95-146

Dear Mr. Caton:

Pursuant to Sections 1.415 and 1.419 of the Commission's Rules, attached please find an original and 4 copies of the Comments of the Ad Hoc Telecommunications Users Committee, in the above captioned matter. Please date stamp the additional copy and return it with our messenger.

If you have any questions regarding this filing, please do not hesitate to call.

Sincerely,

James S. Blaszak

200.04 covltr.doc

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	Contract Tariff
AT&T Corp.	)	Transmittal No. 3076
	)	
Revisions to Contract Tariff F.C.C. No. 360	)	CC Docket No. 95-146

Comments

The Ad Hoc Telecommunications Users Committee ("Ad Hoc") hereby comments on AT&T's Direct Case in the above-captioned proceeding. Ad Hoc has styled its submission in this case as comments because it does not have first hand knowledge of the facts surrounding the dispute between MCI and AT&T over Contract Tariff 360. Ad Hoc, however, has an interest in this case because it could produce precedent that generally could affect long term service arrangements between carriers and customers Because of that concern, Ad Hoc opposes certain positions taken by AT&T in its Direct Case.

AT&T's Direct Case advocates positions that would dilute the effectiveness of the substantial cause test as a safeguard of customer interests in long term service arrangements. AT&T appears to have blundered badly in developing and implementing Contract Tariff 360. In its desperation to escape Contract Tariff 360. AT&T has advanced arguments that would tip the substantial cause balancing test heavily in favor of carriers. The Commission

should reject the AT&T positions criticized below, and resolve this case applying "highly relevant" contract law principles to the substantial cause test.[1]

Issue I: What "substantial cause" showing is AT&T required to make to justify proposed changes to a contract tariff for streamlined business services that are opposed by a customer that acquired service under the contract tariff as a generally available offering?

The Commission should require carriers to make "substantial cause" showings that meet a much higher standard than that proposed by AT&T. AT&T argues,

> [G]iven the lessened degree of regulation for streamlined, competitive services, the test of reasonableness itself becomes more relaxed, as does any corollary test (such as substantial cause) used to help define what is reasonable. For streamlined, competitive services, a carrier should only be required to demonstrate as its prima facie substantial cause showing that it has offered a commercially reasonable explanation of its decision to alter the terms pursuant to which it offers service.[2]

There are several significant problems with AT&T's standard, but the net effect of AT&T's proposal is that AT&T could abrogate long term service arrangements virtually at will.

The Commission should not allow a carrier to abrogate a long term service arrangement merely upon the carrier providing a "commercially reasonable explanation" for its decision to alter the terms of a contract through tariff revisions that are at odds with the contract. A "commercially reasonable

---

1 *See, Competition in the Interstate Interexchange Marketplace*, 10 FCC Rcd 4562, 4574 (1995) ("*Interexchange Reconsideration Order*")

2 Direct Case of AT&T, at 6-7.

explanation" would be a standard that could give the carrier almost unlimited discretion to breach a long term service arrangement. This standard is inconsistent with the very notion of a contractual relationship that binds all parties to the contract.

Ad Hoc is not aware of any commercial contract law doctrine that would allow a party to a contract to default on the contract merely upon providing a "commercially reasonable explanation." Contract law provides limited excuses for nonperformance: mutual mistake, impossibility, and frustration of purpose are recognized excuses for nonperformance [3] The Commission has stated that,

> [C]ommercial contract law principles are highly relevant to an assessment of whether a contract-based tariff revision is just and reasonable under the substantial cause test.[4]

"Commercially reasonable explanation" is not a contract principle that justifies default on a contract, and should not be a basis for meeting the substantial cause test.

Remarkably, AT&T seems to argue that commercial contract law principles should be less applicable as the Commission relaxes its regulation of AT&T in recognition of growing competition. AT&T has it exactly backward. As the Commission loosens its regulation of AT&T, commercial contract principles should be more, not less, applicable to the contractual relationships between carriers and their customers. As customers rely increasingly on the

---

[3] Hunter, *Modern Law of Contracts,* ¶ 19.01, Warren Gorham Lamont (1993).

[4] *Interexchange Reconsideration Order,* at 4574.

marketplace, rather than the Commission's processes, to obtain telecommunications services under just and reasonable rates, terms and conditions, the Commission's application of the substantial cause test should reflect to a growing degree normal contract law principles. The notion that customers of carrier services are likely to need Commission or judicial protection less frequently as the telecommunications market becomes more competitive because the marketplace will punish carriers that default on contracts may, or may not, be true. But even in intensely competitive markets, parties to contracts can rely on established contractual principles to protect their interests. Centuries of contract common law, and the codification of the Uniform Commercial Code, prove this point. AT&T, however, would have the Commission adopt an interpretation of the substantial cause test that would make the telecommunications market an exception.

The Commission should not adopt AT&T's absurd recommendation that carriers should only be required to provide a "commercially reasonable explanation" to justify under the substantial cause test changes to long term service arrangements. Instead, the Commission should direct carriers seeking to implement such tariff revisions to explain whether such changes can be justified under normal contract law principles. Of course, the just and reasonable standard allows the Commission to consider other reasons as justification for carrier default of contracts through tariff revisions if the public interest requires consideration of such reasons. The Commission, however,

should require carriers who are subject to streamlined regulation to bear the burden of persuading the Commission that a standard less demanding than the recognized contract law excuses for default should apply to a particular contractual default caused by the carrier's tariff revisions.

AT&T may be able to justify abrogation of Contract Tariff 360 under the above-described standard. AT&T, however has not argued in its Direct Case that it has justified abrogation of Contract Tariff 360 under commercial contract law principles; nor has AT&T persuasively explained why these principles should not apply. However, given the emerging state of the Commission's application of the substantial cause test, the Commission could afford AT&T an opportunity to justify abrogation of Contract Tariff 360 after clear articulation of the standards against which AT&T's substantial cause showing will be measured.

Within the context of its discussion of Issue I, the Commission also invited parties to comment on, "[w]hether the substantial cause doctrine should result in both parties being bound to a long-term agreement...."[5] The Designation Order then invites parties to address, "[w]hether a substantial cause doctrine adapted to streamlined regulation should essentially convert contract-based tariffs and other term commitment tariffs into agreements that are binding

---

[5] *AT&T Communications Contract Tariff No. 360,* DA 95-1934, para. 16, released September 8, 1995 (*"Designation Order"*).

on customers but subject to change by the carrier through tariff filings that are presumptively lawful and subject only to a streamlined review process."[6]

AT&T's answer to the first question seems to be "no" because of its insistence that the Commission accept a "commercially reasonable explanation" as sufficient justification for abrogation of long-term service agreements. However, as explained above, parties to long-term service arrangements should be able to default on long-term service arrangements only if they can justify default under commercial contract principles The Commission should reserve expressly the authority to consider other factors under the just and reasonable standard, but should do so only if the defaulting party carries the burden of persuading the Commission to consider factors other than those that would excuse nonperformance under recognized commercial contract principles.

With respect to the second question, and contrary to AT&T's argument, the Commission should not allow the substantial cause doctrine adapted to nondominant, streamlined regulation to convert long-term service arrangements into agreements that are binding on customers but can be abrogated by carriers through tariff filings that are presumptively lawful. No presumption of lawfulness should apply to tariff revisions that abrogate long-term service agreements. Indeed, the Commission should require carriers filing such tariff revisions to clearly identify them as such and to file them on at least fourteen days notice. Any other approach because of the operation of the filed

---

[6] *Id.*

rate doctrine, would allow carriers subject to streamlined regulation to abrogate long-term service agreements while binding customers to their commitments. The Commission could not intend that such a gross legal imbalance pertain in the telecommunications marketplace.

Merely allowing customers to terminate long-term service agreements if carriers breach such agreements through filing tariff revisions that are materially inconsistent with the agreements does not sufficiently recognize the customers' expectancy interests in long-term service agreements. Termination without liability does not give customers the benefit of the bargains that they have struck with carriers when they enter into long-term service agreements with carriers. Moreover, merely allowing customers to terminate long-term service agreements without liability after default by carriers puts the carriers in the position of unilaterally being able to determine whether to continue a contractual relationship. A proper balancing of interests in contractual relationships, and under the substantial cause test as it is used under the just and reasonable standard of the Communications Act, should turn, except in extraordinary cases, on application of recognized commercial contract principles. This approach would give the Commission the benefit of centuries of careful legal and public policy thinking on how best to balance the interests of parties to contractual relationships. The Commission would be foolish to rely on any other approach, and should adapt its rules accordingly -- including those applicable to nondominant carriers. This approach, which is entirely consistent

with the Communications Act and cases interpreting the substantial cause test, would allow virtually all tariff filings to be made on one day public notice. Only those tariff filings that would abrogate long-term service agreements would be filed on fourteen or more days public notice

Issue II: Assuming that AT&T may show "substantial cause" to revise Contract Tariff No. 360 by demonstrating economic loss if Transmittal No. CT 3076 does not become effective, what is the relevant universe to be considered in determining whether AT&T is recovering its costs?

AT&T contends that the Commission should only evaluate whether it is suffering economic loss as a result of its provision of service to MCI under CT 360. According to AT&T, the Commission should not consider AT&T's earnings from other services generally or more specifically from the services referenced in CT 360.[7] Again, AT&T's apparent desperation to escape CT 360 appears to have caused AT&T to ignore "highly relevant" contract law. CT 360 is only one of many commercial transactions in which AT&T is the supplier. On some transactions AT&T undoubtedly loses money, but on other transactions AT&T certainly earns a handsome profit. Such is the risk of doing business. But yet AT&T seems to argue that it should be free to default on a long term agreement to provide tariffed telecommunications service merely because it is losing money on that transaction.

---

[7] Direct Case of AT&T, at 10-13.

Contract law provides no support for AT&T's argument. AT&T should attempt to show mutual mistake or commercial impracticability as justification for default. But it has not done so

AT&T also is wrong in arguing that the Communications Act requires that the economic loss analysis be limited to CT 360.[8] AT&T really is arguing that if it is losing money on any term plan, tariff revisions that are designed to stop the loss must be just and reasonable even though such revisions would fundamentally frustrate the expectancy interests of customers. The just and reasonable standard is flexible enough to consider factors in addition to return on a particular service. The just and reasonable standard protects customers, as well as carriers.

Economic loss, however, may be a basis for treating subsequent customers differently than the customers who subscribed to the service before the carrier determined that it was losing money from the service offering. Raising rates for subsequent customers may be economically justified, and thus, might not constitute unreasonable discrimination under the Communications Act. Subsequent customers may not have expectancy interests in preexisting long-term service arrangements that should be protected to the same extent as the interests of preexisting customers under the just and reasonable standard. Nevertheless, carriers who seek to treat such subsequent customers differently than the preexisting customers seek to engage in discrimination, and should

---

[8] *Id.*, at 12.

bear the heavy burden of justifying such discrimination. Whether AT&T has done so in this case may depend on facts to which Ad Hoc is not privy.

Conclusion

AT&T would have the Commission emasculate the substantial cause test in this case. AT&T's legal and public policy analysis of the substantial cause test has no merit. Ad Hoc has recommended a conceptually sound approach to application of the substantial cause test within the confines of the just and reasonable standard. We urge the Commission to adopt the approach recommended herein.

Ad Hoc also urges the Commission to be mindful of the old adage that hard cases make bad law. That is the danger presented by this case and AT&T's Direct Case.

Respectfully submitted,

Ad Hoc Telecommunications
Users Committee

By: _____

James S. Blaszak
Levine, Blaszak, Block and Boothby
1300 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20036-1703
202-223-4980

October 6, 1995
200.04/ct360com

Certificate of Service

I, Einar Torbjornsen, hereby certify that true and correct copies of the Comments of the Ad Hoc Telecommunications Users Committee in the Matter of AT&T Contract Tariff No. 360, on this 6th day of October, 1995 via hand delivery, or first class mail, upon the following persons:

Kathleen M.H. Wallman*
A. Richard Metzger*
Melissa W. Newman*
Common Carrier Bureau
Federal Communications Commission
Room 500
1919 M Street, NW
Washington, D.C. 20554

Geraldine Matisse*
David A. Nall*
Thomas David*
Tariff Division
Federal Communications Commission
Room 518
1919 M Street, NW
Washington, D.C. 20554

ITS, Inc.*
2100 M Street, NW
Suite 140
Washington, D.C. 20037

Richard M. Firestone
Arnold & Porter
555 12th Street, NW
Washington, D.C 20004

Richard R. Meade
Daniel Stark
David J. Ritchie
AT&T
Room 3250H3
295 North Maple Avenue
Basking Ridge, N.J. 07920

Einar Torbjornsen

* By hand delivery.

October 6, 1995

200.04 cetserv.doc